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CHINESE COURT BILL

HEARINGS

BEFORE THE COMMITTEE ON FOREIGN AFFAIRS
HOUSE OF REPRESENTATIVES

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CHINESE COURT BILL.

COMMITTEE ON FOREIGN AFFAIRS,
Wednesday, March 11, 1908.

The subcommittee met this day at 10.30 a. m., Hon. Edwin Denby in the chair.

STATEMENT OF STIRLING FESSENDEN, ESQ., OF SHANGHAI, CHINA.

Mr. DENBY. Please give your full name.
Mr. FESSENDEN. My name is Stirling Fessenden.
Mr. DENBY. Where do you reside?
Mr. FESSENDEN. At Shanghai, China.
Mr. DENBY. Are you a member of the Shanghai bar?
Mr. FESSENDEN. I am.
Mr. DENBY. Before what courts do you practice?
Mr. FESSENDEN. Principally before the United States court for China, and the British supreme court, and the mixed court. I have also practiced in the Austrian, Norwegian, Russian, Danish, and I think German courts, and the American consular courts; in fact, nearly all the consular courts, at one time or another.
Mr. DENBY. How long have you been in Shanghai?
Mr. FESSENDEN. About five years.
Mr. DENBY. You were there, then, before the establishment of the United States court for China?
Mr. FESSENDEN. Yes; practicing law before that.
Mr. DENBY. Will you briefly state what the judicial system of the United States was there, prior to the establishment of the United States court for China?
Mr. FESSENDEN. Prior to the establishment of the United States court for China the judicial functions were all vested in the United States consul, who acted judicially as judge of the consular court, and his jurisdiction included practically every class of case or cause of action which might arise, not only between American citizens, but in any case where an American citizen was a defendant, and in fact he carried out all the judicial powers provided by the treaties with China or permitted under those treaties and covered by the United States statutes and general laws of the United States, so far as could be applied out there.
Mr. DENBY. The whole being under the extra-territorial policy exercised by the United States in China?
Mr. FESSENDEN. Yes, sir.
Mr. DENBY. Now, Mr. Fessenden, can you briefly state what the difficulties and the limitations of that system of jurisprudence were?

Mr. FESSENDEN. Well, to my mind, perhaps the chief difficulty was the fact that the consuls rarely, if ever, were trained lawyers, and the nature of the cases, more especially those involving commercial law, often involved very complicated and difficult points of law, which it was almost practically impossible for a man without any legal training properly to decide. Then aside from that, there was no corps of trained assistants who understood the procedure, and really no proper equipment for carrying out the functions of the court. Then it was difficult for a consul to execute all the law which really was in his hands, because there was no real machinery provided for it, and the other functions of his office, namely, the diplomatic functions, interfered to a great extent with the consul discharging all these duties at one time.

Mr. DENBY. This, of course, was quite regardless of the character of the consuls, which, in some cases, may have affected it?

Mr. FESSENDEN. Yes. In some cases, however, the character of the consul affected it.

Mr. DENBY. Assuming that we always had good consuls, there were still inherent difficulties?

Mr. FESSENDEN. Yes; from the nature of the thing itself.

Mr. DENBY. As to the law which these consuls administered, was that law well determined, and was it determined what laws the consuls should administer?

Mr. FESSENDEN. No. The only laws that the consuls had were the old rules and regulations laid down by the minister in the old days, which had been added to from time to time in the attempt to improve them; but it really was more or less futile.

Mr. DENBY. The statute gives the minister power to amend those regulations if he chooses?

Mr. FESSENDEN. Yes; and in so far as they were applicable, the statute laws of the United States applied, but it was only in rare cases indeed that you could find a statute which directly applied to a cause of action which would come before a consul.

Mr. DENBY. The statutes you refer to are the statutes of the United States so far as they are applicable, and the special statutes governing the case?

Mr. FESSENDEN. Yes; the great body of substantive law which governs the relations of man to man could only be found in the common law, and of course it has been a question which lawyers and judges and everybody else have discussed pro and con, as to what the common law of the United States is, or whether there is a tangible and definite body of law known as the common law of the United States or not.

Mr. DENBY. Just on that point, did not the judge of the United States court, Judge Wilfley, make a rather sweeping definition of the common law, stating practically, in the Roberts will case, that the common law is what was enforced in England at the time we declared our independence, and such laws as have been generally accepted throughout the United States by the various legislatures?

Mr. FESSENDEN. Yes.

Mr. DENBY. The advent of that court helped to cure that defect considerably, did it not?

Mr. FESSENDEN. Yes. Before that we were in the situation, practically, of living in the twentieth century and attempting to apply the laws of the seventeenth century.

Mr. DENBY. That meant that prior to the advent of the court and prior to the Roberts will case decision, particularly?

Mr. FESSENDEN. I do not think it was in the Roberts will case that that common law decision was made. I think it was made in another case.

Mr. DENBY. It was in a case of obtaining money under false pretenses?

Mr. FESSENDEN. That was the Biddle case.

Mr. DENBY. Yes; and that part of the decision was upheld by the court of appeals.

Mr. FESSENDEN. Yes; I think so. After reading the decision of the appellate court, there was some question in my mind whether they based it exactly on the same reasons as did the judge of the United States court for China.

Mr. DENBY. That leaves it still more necessary that that law shall be corrected and improved?

Mr. FESSENDEN. My impression is that the appellate court was rather inclined to go on the ground that the situation there in China was somewhat analogous to Government property here, like a post-office, or anything of that sort; that the general common law of the United States extended over American citizens there, as if in a sense China were regarded as United States territory, and I believe they made that a somewhat important basis of the decision. I am only stating that from recollection.

Mr. DENBY. Of course the law in the United States now is that on a Government reservation or on Government property the law of the locality in which that reservation is situated, in the absence of other United States law governing it, shall be held to apply?

Mr. FESSENDEN. Yes.

Mr. DENBY. And it would be hard to know, if we regarded China as a reservation in that sense—it would be hard to know what the law is?

Mr. FESSENDEN. Yes; that is where the uncertainty as to exactly what was meant by this decision arose. The appellate court judge in his written opinion was somewhat obscure on that point——

Mr. DENBY. Leaving the matter still in some doubt?

Mr. FESSENDEN. Yes.

Mr. DENBY. And one of the difficulties in that question is, as I understand it, that there are certain crimes and certain rights that are not touched upon at all by the United States statutes and the common law, concerning which we had no law to govern?

Mr. FESSENDEN. Yes. I can give you an illustration. The crime of embezzlement is not a common-law crime and never was. There is perhaps more than one statute of the United States covering embezzlement on the part of Government employees, but there is no United States statute which applies to embezzlement generally, so that there was no law under which a man could be legally punished for embezzlement committed in China.

Mr. DENBY. That being covered by the provision that the law governing localities should govern?

Mr. FESSENDEN. Yes.

Mr. DENBY. It was found in China at that time that there was very great difficulty in administering substantial justice and determining questions among people, civil and criminal?

Mr. FESSENDEN. Yes; very great difficulty; and that became more apparent as the magnitude of American interests increased there. When the interests were very small the questions which came up were not so important; but to-day there are a great many business interests of very large magnitude, and cases involving very large amounts of money come up for adjudication.

Mr. DENBY. And there are a great many more Americans there capable of committing crimes than there used to be, because there are more Americans there?

Mr. FESSENDEN. Yes.

Mr. DENBY. I do not mean to make any reflection on the character of Americans in general.

Mr. FESSENDEN. Yes.

Mr. DENBY. Then you, as a resident in Shanghai, amenable to these laws as an attorney, were heartily in favor of the creation of the United States court for China?

Mr. FESSENDEN. Absolutely.

Mr. DENBY. Were you admitted to that bar at once on the formation of the court?

Mr. FESSENDEN. Yes; after taking an examination.

Mr. DENBY. Now, Mr. Fessenden, you, of course, have made a study, as a part of your duty as a member of that bar, of the act creating the court?

Mr. FESSENDEN. Yes, I have.

Mr. DENBY. Briefly, can you recall some of its deficiencies? I assume there were deficiencies.

Mr. FESSENDEN. The chief deficiency as a practical matter was the lack of any criminal code, or any civil code, either. That is, there was no definite law on all the various subjects, commercial and otherwise.

Mr. DENBY. Briefly, it left the deficiencies of the law to be administered practically as before?

Mr. FESSENDEN. Yes.

Mr. DENBY. So you have felt all along the need of a new code act of some character, have you not?

Mr. FESSENDEN. I have always felt that it would be impossible for any court, however constituted, and no matter how able the judge may be, to satisfactorily administer the law out there, unless he had a proper body of law to administer. As it is to-day, he has no proper body of law.

Mr. DENBY. That is the point.

Now I call your attention to the bill H. R. 17142, which is the bill introduced by myself, seeking to extend to China that very body of laws which is now universally held to be necessary; and with your permission we will proceed and discuss the bill, section by section, and I will ask your opinion on the various proposed changes in the law which are set forth in this bill.

First, as to the establishment of the court, have you already read the bill?

Mr. FESSENDEN. Yes; several times.

Mr. DENBY. Now, first, as to the establishment of the court: The first section is that the jurisdiction shall be exercised through the United States court for China. There was a court to be called the United States court, consisting of a judge, a district attorney, a

clerk, and a marshal. The new portion there is that of a public administrator for China, with certain defined duties. Will you give us an opinion concerning that proposed official?

Mr. FESSENDEN. My own individual opinion as to that is that I do not hardly consider, from my experience, that a public administrator is really necessary. The total number of Americans in China can not at the outside be over 4,000.

Mr. DENBY. I would put it a little more than that.

Mr. FESSENDEN. Between 4,000 and 5,000, and the number of estates which the United States court of China has had to administer in the year it has been in operation has been small. My impression, speaking from memory, is that it has not been at the outside more than ten or twelve.

Mr. DENBY. We shall have the exact figures from the report of the court.

Mr. FESSENDEN. Most of the cases, in my experience, in which I have appeared in the court, are comparatively simple; that is, they simply require the appointment of an administrator, who prepares and submits an inventory.

Mr. DENBY. Under bond?

Mr. FESSENDEN. Yes, under bond, and reports from time to time to the court, and carries out their instructions and directions; so that the actual business or work which the court has to do is comparatively small in the matter of estates, their chief work being to interpret the law and advise in its administration. But one difficulty about it is that there is no bonding company in China, so that the bonds furnished by the administrators require their obtaining their friends as sureties, which is not exactly difficult, but at times it is rather unpleasant.

Mr. DENBY. Let me go a step further. The bill at present gives the United States court for China jurisdiction in all cases involving an amount in excess of $500, or criminal cases other than those in which sixty days' imprisonment or $100 fine may be imposed, and those given a review by the higher court. That jurisdiction of what we might call the justice-court variety is left with the consul-general at Shanghai?

Mr. FESSENDEN. Yes.

Mr. DENBY. Do you not deem it advisable to leave that jurisdiction there, and if not, what is your objection?

Mr. FESSENDEN. My opinion is that it would be far better to take away all the judicial functions of the consul-general in Shanghai for this reason: That that office is in a great sense different from any other consular office in the service, owing to the peculiar conditions of extra-territoriality. The real functions of the consul there, aside from the usual consular duties, include those of a diplomat, really. Shanghai is the great commercial center of all the northern half of China, and even a greater area than that.

Mr. DENBY. It is the greatest commercial port in the Orient?

Mr. FESSENDEN. Yes. It is the greatest commercial port in the Orient, and the consul-general there is brought into official and diplomatic relations with the different consular and diplomatic representatives of some seventeen foreign nations and the Chinese, and where so many nations live in a single community like that and in a country so far distant from their own there are all sorts of difficult diplomatic

questions arising in regard to the internal conditions of that settlement which effect American interests, commercial, legal, and otherwise, all these things being outside the usual duties of a consul. Then there is another reason that I regard as equally important, and that is that our consulate should be regarded by the Chinese to be of as high rank in every respect as that of any other foreign nation, because the Chinese pay particular attention to appearances and conventionalities and all that sort of thing, which they class under the head of "face pidgin." The other nations, like England, Germany, and France, the greater nations, have placed all the minor judiciary powers, which correspond very largely to our magistrate's court or police court, in the hands of a vice-consul or assessor, or at least a minor official connected with the consulate.

Mr. DENBY. The public administrator's duties under this bill largely consist, in addition to his administration of estates, in his performance of that minor judicial function. Is it your opinion that it should not be vested in the public administrator, or vested in a United States official—the vice-consul or some other one?

Mr. FESSENDEN. In my opinion it would be better to put it in the hands of a vice-consul entirely.

Mr. DENBY. For what reason particularly?

Mr. FESSENDEN. Well, under the provisions of this bill it would appear that this so-called public administrator, as I understand, would act also as assistant judge, aside from being public administrator and judge of the consular court.

Mr. DENBY. He may even act under this bill as an independent judge on circuit, when the judge in chief can not go?

Mr. FESSENDEN. Yes; and it seems to me, from my experience out there, that that particular plan would put almost all the work on this one man or official. It seems to me it would put two-thirds of the entire work which really belongs to the court in the hands of this one man, leaving a chief judge with double the salary who is not doing anywhere near the amount of judicial work of this minor judge; and in addition to that, taking all the judicial work of that consulate over any given period, it does not amount, in my judgment, to more than enough to really occupy the time of one judge more than enough to keep him busy. It is true that since the establishment of that court out there the court has been busy and full of work; but that work, in my judgment, has been incidental to the establishment of a court under the peculiar conditions under which this court was established, and due to the fact that they had no code of laws and were obliged to spend days and days of study and work in the simplest cases.

Mr. DENBY. To try to get a law to fit the crime?

Mr. FESSENDEN. Yes; to try to get a law to fit the crime; whereas if we had a proper code we could do away with all that; and in my judgment one man could do all the probate work and all the other work of the court with ease with the exception of these minor police court cases, etc., which ought to be put into the hands of a vice-consul, or commissioner, or some minor official.

Mr. DENBY. With an appeal to the other court in certain cases?

Mr. FESSENDEN. Yes. I can safely say I have probably tried more cases in that court than any lawyer there, except the district attorney;

and, speaking very frankly, it does not seem to me that the disposition of the work made by this bill is entirely just or fair or required by conditions.

Mr. DENBY. That is a fair statement. In your observation of matters in Shanghai and the working of the consulate-general in Shanghai what would you say of the work thrown upon the consul-general by his judicial plus the other duties? I think you covered that partially already.

Mr. FESSENDEN. As I say, I think it is unjust to the consul-general himself, and I think it is prejudicial to the consular service to require a man whose sole attention should be given to these more important questions which I have mentioned to be obliged to be bothered and troubled with the minor duties of a small magistrate's court. I mean it is beneath the dignity of the position, to begin with.

Mr. DENBY. Can yon give us any idea of the amount of time the consul is obliged to give to this function?

Mr. FESSENDEN. I could not give an accurate opinion as to that; but, taking the actual cases which come before the consul-general and the number of people he is obliged to see in connection with them, and the incidental bother, I should say that more than one-half his time is devoted to that one minor branch of the work.

Mr. DENBY. Which, considering that he is the chief consular officer in Asia, is entirely wrong and absurd.

Mr. FESSENDEN. Yes. That is my opinion, that it is absolutely absurd that that condition should be allowed to exist there.

Mr. DENBY. Who sits as assessor in the mixed court when a citizen of the United States is a party to the proceeding?

Mr. FESSENDEN. Usually some man attached to the staff of the United States consulate.

Mr. DENBY. Not the consul-general?

Mr. FESSENDEN. Not the consul-general. No consul-general could, without absolutely ruining the prestige of the office and his own personal dignity, sit in the mixed court, because as a matter of fact and in the eyes of the Chinese the consul-general greatly outranks the Chinese magistrate who presides in that court.

Mr. DENBY. Give briefly an account of the mixed court and its functions.

Mr. FESSENDEN. The mixed court is a Chinese court which has jurisdiction over the Chinese in what is known as the international concession. That is, more accurately speaking, it is really called the Anglo-American settlement, because the French have a mixed court in their settlement. This court has jurisdiction over all criminal and civil matters in which Chinese residents in that district are defendants.

Mr. DENBY. The court is primarily a native court, presided over regularly by a native magistrate?

Mr. FESSENDEN. Yes; always. It is customary, whenever the interests of a foreigner are involved, to have an assessor from the consulate of his nationality sit on the bench with the magistrate, but that assessor has no power or authority whatever beyond what moral suasion he can bring to bear on the magistrate himself.

Mr. DENBY. He simply watches the proceedings?

Mr. FESSENDEN. Yes; he simply watches the proceedings, with no power to issue an order or exercise any influence.

Mr. DENBY. Who pays that magistrate?

Mr. FESSENDEN. The Chinese Government, according to my impression.

Mr. DENBY. Is the constitution of that court a treaty matter?

Mr. FESSENDEN. I am not clear, but I think it is either a treaty matter or a matter arranged by the foreign ministers at Pekin and afterwards sanctioned in a way that would have the same effect as a treaty.

Mr. DENBY. Now, I will not ask you, Mr. Fessenden, anything about the salaries of these minor officials mentioned here, or any officials, because that is largely a matter of personal opinion.

Mr. FESSENDEN. I do not care to express an opinion on that. But there is one point, before you go on, that I would like to mention, and that is, that I was a member of the executive committee of the American Association in China when the memorial which was presented to Congress was prepared, and this suggestion of an additional judge was made by the then president of the association and carried through by his influence, with the idea that if the additional judge should be appointed for that court, there should be some provision by which, if litigants desired it, a case involving any important point of law could be heard before two judges sitting together, and that was the real reason for the suggestion that this provision be made in the bill. That was really the controlling one. It was understood very well by those of us who were interested at the time, that if such a bill were presented and became a law, other duties might be placed in those judges' hands, and the controlling idea, as I say, was that important cases might be heard before both judges, as that might tend to counteract any deficiency growing out of a system where a jury trial does not exist.

Mr. DENBY. Do you find that point covered in the bill?

Mr. FESSENDEN. That point is not covered in the bill.

Mr. DENBY. You take it that if the public administrator and judge were created under this act as it stands, he would not be authorized to sit with the other judge, and the other judge would not be authorized to ask him to?

Mr. FESSENDEN. Yes; and my idea would be, if it were deemed wise to appoint another judge there, some such provision as that should be made, because the decision of a case by two judges would greatly tend to lessen the irritation existing out there when one judge is the sole judge of both the law and the facts.

Mr. DENBY. Now, as to the duties of court officials, I presume you have no particular recommendation?

Mr. FESSENDEN. Yes; there is one point about that. That appears on page 5, beginning at the bottom of page 4.

Mr. DENBY. Line 25, page 4?

Mr. FESSENDEN. Yes. In the detection of crime and the investigation of criminal cases, and so forth, it gives the power to the district attorney to subpœna witnesses to appear before him, and to administer oaths, and compel them to testify, and to practically adjudge anyone to be guilty of perjury who, in a proceeding of that sort, does not tell the truth. I think myself that it may be possible that the district attorney perhaps needs somewhat greater powers for the investigation of crime than he has; but if that is done I am strongly of the opinion that it is not right or proper to put this thing solely in the hands of one individual; that is, the power of issuing

subpœnas, and the power to examine, and practically the power of deciding, whether the witness has told the truth or not.

Mr. DENBY. And the power of prosecuting for perjury?

Mr. FESSENDEN. Yes. It is all in the hands of one man. I have no personal feeling about it, because the district attorney is a personal friend of mine; but I do think that the probabilities and possibilities of misuse of a thing like that, though not from intention, should prompt one to be careful in drawing such a provision.

Mr. DENBY. Possibly it may be misused overeasily?

Mr. FESSENDEN. Yes, overeasily; and matters of peculiarity of temperament, or intellect, or prejudice would place him in the position of abusing his power very greatly and there would be no redress.

Mr. DENBY. In other words, you think that is too broad?

Mr. FESSENDEN. Yes, too broad and too strong; and so far as I know, the only reason for its adoption is that they think they need more power. A provision similar to this has been in force in the Philippines, and the position taken is that the conditions in Shanghai are so bad that they require the same drastic methods as in the Philippines. I do not agree with that. I know the conditions in Shanghai have been bad, but not so bad as this bill would seem to indicate.

Mr. DENBY. The conditions in China are getting better, in your opinion?

Mr. FESSENDEN. They are getting better.

Mr. DENBY. What change would you suggest in that?

Mr. FESSENDEN. I would point out that although there is no system in force in China similar to our grand-jury system, even to-day the district attorney can lay an information at any time he sees fit, when in his judgment he can present evidence, and of course that gives him the power to subpœna witnesses in court, to try the very case in which he has laid this information.

Mr. DENBY. But the case must be in open court in that case?

Mr. FESSENDEN. Yes. But my suggestion would be that if, in the judgment of the committee, the power should be extended in this direction, the provision should be to the effect that the district attorney must conduct this examination before either a vice-consul, or a consul, or some other official.

Mr. DENBY. Or the judge of the United States court?

Mr. FESSENDEN. Yes; so that the whole power of subpœnaing or administering oaths and examining and deciding the results of examination should not be in the hands of the prosecuting officer alone.

Mr. DENBY. Your idea is that this function is supposed to correspond to a certain extent to that of a grand jury?

Mr. FESSENDEN. Yes.

Mr. DENBY. But that in the case of a grand jury there are restrictions from the mere presence of the jury and the other officers of the court, whereas in accordance with your view this looks very much like a star-chamber proceeding?

Mr. FESSENDEN. Yes.

Mr. DENBY. And while you would not like to take away the power the district attorney holds, or the power given him under this bill, you are looking to the proper exercise of that power and would compel it to be done under certain restrictions?

Mr. FESSENDEN. Yes.

Mr. DENBY. But your amendment would not take away from him any power?

Mr. FESSENDEN. No.

Mr. DENBY. Your suggestion is that he must exercise his power in the presence of a court or some functionary?

Mr. FESSENDEN. Yes. It removes the star chamber feature and the appearance of an inquisition, but it would leave to him the same powers as are provided in this section.

Mr. DENBY. I think your comments on that are fair and seem to be pretty sound. Have you thought over the form of a proposed amendment?

Mr. FESSENDEN. No; but I think that my suggestion that it be made before a consular official who has the power to administer an oath, or before one of the judges, would cover it.

Mr. DENBY. We might, then, just say, after line 9, "*Provided, however,* That the proceeding shall take place in the presence of a vice-consul or an official of the United States consular court for China, or of the United States courts for China, who shall administer the oath."

Mr. FESSENDEN. Yes; and in whose presence the examination shall be conducted.

Mr. DENBY. Now I will ask you as to the paragraph on page 5, line 21, if you have any suggestion to make with regard to this clause, that "The district attorney shall have authority to employ, subject to the approval of the court, assistants on behalf of the United States in connection with the investigation or conduct of a case in which the United States is or may become a party."

Mr. FESSENDEN. I do not see any objection to it. I think it would be very rare that an occasion would arise when it would need to be exercised.

Mr. DENBY. Now read on, and if I want to ask you anything I will do so.

Mr. FESSENDEN. On page 6, line 6, the bill says: "The district attorney shall not engage in the practice of his profession during his tenure of office." I think by all means that should be adopted, because while I am quite aware that the law in the United States allows district attorneys to engage in private practice, from practical experience out there I find that the fact that the district attorney was originally allowed to do it under the peculiar circumstances existing there has subjected the courts and the district attorney to certain criticism.

Now I wish to call your attention to the fact that on page 3, lines 13 to 16, you should carefully consider whether or not the position of marshal to the consulate-general at Shanghai is abolished by this act.

Mr. DENBY. Very well. You have now a marshal?

Mr. FESSENDEN. Yes; and he combines the functions of several officers. He is marshal and deputy clerk and deputy consul all in one office. It was never clear to me under just which provision he got his salary. I think it came largely from fees.

Mr. DENBY. That whole question was thrashed out here, and I took it up with the Department, and I took it up with the chairman of appropriations, and I took it up here in the Committee on Foreign Affairs, and the universal opinion was that the fact that we put back the appropriation to pay the marshal operated to recreate the office had it ever been abolished.

Now, we come to a point, Mr, Fessenden, on which I know a violent difference of opinion exists at Shanghai itself. This bill provides for assessors, and for the method of selecting them, and for the powers which they shall have. I would like you to read that over carefully and give your opinion of any features that you would like to comment upon. What is your opinion touching the provision for assessors—the stipulation that their findings shall not govern the judge, but that he shall be the sole judge of facts as well as of law; and the further provision that if they dissent from him, their dissent shall be forwarded as a part of the record to the court of appeals in case of appeal. In your opinion that is sufficient as it stands, is it, or do you think the assessors should have jury powers? If you do not care to give an opinion on that, never mind.

Mr. FESSENDEN. My opinion is that the provision as expressed in the bill ought to work very well, because I go on the assumption that a judge sitting on the bench would not voluntarily go against the findings of fact of the assessor unless there was some very excellent reason for it, and the moral effect of the findings of fact by the assessor, would, of course, weigh considerably with any judge.

Mr. DENBY. Is not the argument somewhat similar to the argument which leads to giving to the courts in this country the power to set aside the finding of a jury when it considers it necessary to do so, so that you think that that provision with respect to assessors would be satisfactory?

Mr. FESSENDEN. I think it ought to be tried, anyway; I think it is as good an arrangement as you could probably get.

Mr. DENBY. You would rather see that in the bill, or see the assessors vested with full jury powers?

Mr. FESSENDEN. I think that would be as good as that.

Mr. DENBY. Now, on page 10, line 14, the bill provides: "The court may, for lawful cause shown, excuse from attendance generally or in a particular action any person liable to be summoned as assessor, and may, for like cause, discharge any assessor from further attendance." What lawful cause would be held to cover, in your opinion?

Mr. FESSENDEN. I suppose that would cover the usual reasons for excusing a juror in this country.

Mr. DENBY. Relationship, or violent prejudice, or the causes set forth in the bill; business, or death in the family, or sickness?

Mr. FESSENDEN. Yes.

Mr. DENBY. You think that provision is safe?

Mr. FESSENDEN. Yes. Of course in working it out practically it might result in your getting three assessors of a particular religious sect, and all that, whose opinion might be violent. You could not help that, however.

Mr. DENBY. The judge would have the right to refuse them.

Mr. FESSENDEN. I think that is as good an arrangement as you could get.

Mr. DENBY. And besides the attorneys could protect their rights and set forth the reasons why they might be excused. Now let us consider the section as to jurisdiction.

Mr. FESSENDEN. I do not see any objection to that. I think that is very good.

Mr. DENBY. I will ask you to state why it seems particularly desirable that the laws of the State of California, where not inapplicable, shall be extended to China?

Mr. FESSENDEN. There are two reasons in my mind. One is that in the opinion of a good many lawyers, who have examined the laws of California, it is held that those laws are reduced to a very definite form and shape and are not so voluminous and complicated as the laws of some of the other States.

Mr. DENBY. They were written by Justice Field, were they not?

Mr. FESSENDEN. Yes; and besides that our appeal court is in California, and our United States circuit court there is more familiar with California law and practice and procedure; and as we are just beginning, it is perfectly easy for us to conform our practice in a measure to that, so that there will be a sort of similarity between the two courts, in a sense.

Mr. DENBY. Have you any objection to our comments to make on the proviso of section 6, that the judge shall have authority from time to time to modify and supplement the rules of procedure? You will notice in that connection that his modification or supplementing shall only have the force and effect of law upon the approval of the Secretary of State. In other words, he is not left with plenary powers to make the modifications as he wants to.

Mr. FESSENDEN. No. I think the provision is necessary, there being no established procedure for that court that you could really call an established procedure. It is necessary to evolve that as time goes on, and as the conditions there are very peculiar, eventually the procedure of that court will be a practice sui generis. It belongs to itself, and it must be a matter of experiment from time to time.

Mr. DENBY. Is there anything in the appeal proviso, section 7, on which you have comments to make?

Mr. FESSENDEN. Yes. There is one on page 14. I make the suggestion on the assumption that an additional judge shall be appointed there. It says:

> *Provided, however*, That there shall be no review of the findings of fact in actions of whatever nature originally involving a value not exceeding five hundred dollars or a penalty of one hundred dollars fine or sixty days' imprisonment, or both, if heard without assessors, or, in which, whatever the value or penalty involved, being heard with assessors, the judge and a majority of the assessors shall have agreed in the findings.

I suggest that if this additional judge is appointed, if a case of that nature is tried before a single judge he may appeal to the full bench and go no further. That is, if he is dissatisfied, let the litigant have the case submitted again to two judges sitting together. I think they have a provision or custom of that sort in the British court. There is a strong feeling in the community that they should not be shut off from appeal in all cases, because they have always had the right of appeal. I do not think any great harm would be done if you let that stand.

Mr. DENBY. If, on the other hand, the bill does not provide for the creation of a new judge, but if the power to try these minor cases is left with an official of the consulate-general, would you still believe in leaving an appeal with the United States court for China?

Mr. FESSENDEN. Yes; I think so, for this reason: Because out there, under the peculiar conditions of extra-territoriality, difficult points of law and questions of fact frequently arise that are very important and serious, and I think that should be left open in that way.

Mr. DENBY. But you would not want to carry the appeal beyond the United States court for China, would you?

Mr. FESSENDEN. No, I do not think so, so long as in all these minor actions you could have assessors to find the facts. If you gave them assessors, no appeal; without assessors, then an appeal.

Mr. DENBY. Now, as to the jurisdiction of consular courts in relation to the removal of actions; you notice that it states the consular courts shall have concurrent jurisdiction?

Mr. FESSENDEN. Yes; I noticed that.

Mr. DENBY. Would you make that exclusive?

Mr. FESSENDEN. There would probably be cases of such magnitude that parties would prefer they should go into the United States court for China in the first instance. You have provided for that, I think. It would seem to me that it might possibly be better to substitute the word "exclusive" for "concurrent" in line 14, it being of course understood that an appeal will lie from the decision of the consular court to the United States court for China in all cases. I do not see any reason for giving a concurrent jurisdiction, which apparently means that a man may bring his action in any court he wishes. If you are going to give concurrent jurisdiction, you might just as well have no consular court, practically.

Following up the same line of argument, I would suggest, if the committee concurs, that the phrase "concurrent jurisdiction" should be changed to "exclusive jurisdiction," and that in lines 11 to 15, on page 15, the words "or on its own motion and for reasons to be made of record" be stricken out.

Now, coming to bankruptcy and patents and trade-marks, there is one thing that I want to offer as a suggestion. I think the provision itself is all right, although at the outset there may be difficulty in administering all these things under the peculiar conditions. But I want to suggest this to you: As the bill is drafted, it seems to me upon the application of any foreigner as against an American the court would be obliged to enforce the laws applying to trade-marks, and so forth. As you are well aware, this whole matter of trade-marks is a subject of treaty, and was taken up by Germany, England, Japan, France, and the United States, I believe, in 1903 or thereabouts, and they covered this whole trade-mark business; but these treaties, as I understand, have not yet been ratified entirely, so that all the provisions of trade-marks which they cover have not been put in force. Now, I suggest that the United States courts be given power to enforce the law regarding trade-marks in their discretion in favor of foreigners who give us a reciprocal protection.

Mr. DENBY. I think that is a good point.

Mr. FESSENDEN. I will cite an illustration. The Japanese have shown a marked tendency to appropriate American trade-marks, and to refuse to extend any protection to the citizens of any other nation who apply for protection against infringement by the Japanese. I think it would not be wise for the American courts to protect a Japanese subject, for instance, as against an American, when an American subject does not get like protection in a Japanese court against infringement of an American trade-mark by Japanese. I think that inasmuch as this is a matter of treaty out there, the condition that exists there should be borne in mind; and I cite you an actual example, which will illustrate what I mean. I traveled the whole length of the Imperial Railway from Ching Wan Taow to Tientsin shortly after

the British-American Tobacco Company had sent their advertising car along that route and placed their advertisements along the line of the railroad track. Shortly after that a Japanese tobacco company, traversing the same route, painted out the name of the British-American Tobacco Company from the advertisement and inserted their own name, and up to the present time I have still to learn that the British-American Tobacco Company could get any redress.

It is a well-known fact in the business community in the East that just before the Japanese trade-mark law came into operation certain Japanese individuals filed with the Japanese Government American trade-marks as their own, among them being, as reported, those of the Singer Sewing Machine Company and the Columbia bicycles and other firms and compelled the real owners of those trade-marks to buy them back from the individuals who registered them, and no redress could be obtained from the Japanese courts.

Mr. DENBY. That was in Japan?

Mr. FESSENDEN. Yes.

Mr. DENBY. In order to get their registration in they had to buy them back from those fakirs.

Mr. FESSENDEN. Yes. No single business question in the East has given us quite so much difficulty as this trade-mark question, and although a strong attempt has been made to regulate it by treaty, the provisions of the treaty have not come into effect, because it was reported that the Japanese and possibly others are not really acting with a bona fide intention of submitting to reciprocal protection. That is what it amounts to. Therefore I think the court should be given discretion as to whether it should enforce the laws of the United States in such cases.

Mr. DENBY. On page 21, line 5, this clause appears, that——

> Real property in China belonging at the time of his death to a citizen of the United States dying after the date when this act shall become of force shall be deemed to be personalty, and shall be subject to the law herein provided for the administration and devolution of an estate of personalty.

That section seems to be a very necessary and important one.

Mr. FESSENDEN. So far as I can see, it seems to be a very excellent one. That is my opinion.

Mr. DENBY. Mr. Fessenden, is it not true that one of the great difficulties in administering estates in China, which are possessed of realty, is to determine what law shall govern?

Mr. FESSENDEN. Precisely.

Mr. DENBY. The rule in the United States, of course, is that the law of the site of realty shall govern, but in these instances the law of the site of the realty is Chinese law, complicated and difficult to administer. That is the reason, is it not, why it is advisable to put in this section?

Mr. FESSENDEN. Yes, sir. I do not see that any possible harm could come from regarding real property in that way, because the British practice for years out there has been to disregard the law of real property in matters of dower and transmission of decedents' property. They have never followed the law at home, because it is practically impossible to do that.

Mr. DENBY. The realty remains realty while the parties are living?

Mr. FESSENDEN. Yes.

Mr. DENBY. When it comes to the administration of estates of decedents, it becomes personalty, and this is a very good provision?

Mr. FESSENDEN. Yes, sir.

Mr. DENBY. Have you any comments to make on the provision beginning on page 24, that—

> Any offense committed by a citizen of the United States on a ship of American registry, or on a ship of foreign registry in the company of which ship he was not enrolled, or on a Chinese or other ship not lawfully entitled to claim the protection of the flag of any recognized state or power, on the high seas at a distance of not more than two hundred miles from the coast of China and beyond the jurisdictional waters of another state or power, said ship being bound for or first coming into a Chinese port, shall be deemed an offense within the jurisdiction of the United States in China for all purposes equally as if committed within the territorial jurisdiction of China.

Mr. FESSENDEN. I do not see any objection to it. That is all right, I think.

In the next paragraph, beginning on line 13, in regard to the detention of American ships pending trials, a serious question arises—whether the end in view justifies the broad power given. I would like just to call the attention of the committee to the great extent of the power given and the trifling character of the ordinary offenses committed on those vessels. Another consideration is that, as sometimes happens, employees on a vessel have a grudge against the owners or the officers of a ship, and this provision might put it in their power to serve their grudge to their heart's content without danger or cost to themselves and to embarrass the innocent owners of the ship.

Now, I think this extradition provision is very good and very important. I do not know just how it would always work, but I would imagine it would work well.

Mr. DENBY. You have read that extradition clause, have you, and find it all right in a general way?

Mr. FESSENDEN. Yes. It will have to be tried before it becomes absolutely perfect; but it will work out, I think.

Mr. DENBY. Now as to nationality, on page 28. What suggestion do you make as to that clause?

Mr. FESSENDEN. I consider that section 14 is unnecessary, and that the law as it stands is sufficient, and sufficiently covers the subject-matter of that section. This is a radical change of established law, as to which, in my judgment, no conditions exist warranting it. It says:

> SEC. 14. NATIONALITY.—In actions brought in the courts of the United States in China the petition or information or like pleading must allege that the defendant is a citizen of the United States or under the protection of the United States, and this allegation will be presumed to be true and need not be proved except when the defendant, under oath, denies that he is a citizen of the United States or under the protection of the United States. In criminal actions, wherein it is proved that the accused is commonly reputed to be a citizen of the United States or under the protection thereof, a plea of foreign nationality on the part of the defense shall be required to be proved affirmatively.

You see, the consul-general and other officials object to the principle involved.

Mr. DENBY. You say they object to it?

Mr. FESSENDEN. Yes.

Mr. DENBY. You think that clause or section might come out bodily?

Mr. FESSENDEN. Yes.

Mr. DENBY. Then we will pass on to section 15, as to rules of court. You approve of that substantially, I understand?

Mr. FESSENDEN. I do.

Mr. DENBY. That does not change the existing law.

Mr. FESSENDEN. So far as section 15 is concerned, I see no objection. This is the rule now in effect.

Mr. DENBY. Now, Mr. Fessenden, speaking generally, you believe, do you not, that the enactment of this bill is not only advisable, but you may say absolutely necessary for the proper administration of justice and of our courts in China?

Mr. FESSENDEN. Yes, sir. The bill with the suggestions I have made is a good bill, and is necessary.